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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1415

THE BOARD OF EDUCATION OF THE KANKAKEE SCHOOL DISTRICT NO. 111, A SPECIAL CHARTER DISTRICT, COUNTY OF KANKAKEE, STATE OF ILLINOIS,
Respondent,

vs.

KANKAKEE FEDERATION OF TEACHERS LOCAL NO. 886, HERBERT WHITE, LILLIE FORD AND PHILLIP RILEY, AS OFFICERS AND REPRESENTATIVES OF THE KANKAKEE FEDERATION OF TEACHERS LOCAL 886 AND HERBERT WHITE, LILLIE FORD, PHILLIP RILEY, JOHN KENNEDY, WILLIAM STEWARD, SR., STEVE BRECKON AND JAMES ROBINSON, INDIVIDUALLY,
Petitioners.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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The Respondent, the Board of Education of The Kankakee School District, No. 111, respectfully maintains that no new or undecided aspect of constitutional law is involved in this cause so as to entitle the Petitioners to the issuance by this Court of a writ of certiorari to the Supreme Court of Illinois to review its opinion and judgment in this cause.

ADDITIONAL QUESTION PRESENTED.

Assuming, *arguendo,* that the issuance of an order restraining a strike and picketing without notice is for any reason erroneous and subject to a motion to dissolve the injunction, are those restrained entitled under such circumstances to ignore the order?

CONSTITUTIONAL PROVISIONS AND STATUTES.

United States Constitution
Preamble

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Constitution of the State of Illinois.

Article VIII.

Section 1. Common school system provided.

The general assembly shall provide a thorough and efficient system of free schools, whereby all children of this state may receive a good common school education.

ADDITIONAL STATEMENT OF FACTS.

On Monday, April 28, 1969, the schools remaining closed the Respondent filed its motion for preliminary injunction showing that it had filed its complaint for an injunction against the Petitioners, a temporary restraining order had been issued, and a writ of injunction served upon all parties defendant, which petition was filed pursuant to Illinois Revised Statutes, Chapter 69, Section 3-1. The motion requested the matter be set for hearing at the earliest possible time, and it was set for hearing May 2, 1969 at 9:30 A. M., at the same time as the hearing on the order to show cause entered April 29, 1969.

All parties in interest were served with notice of hearing on the preliminary injunction on April 28, 1969 and were served with the order to show cause and petition for rule on April 29, 1969. Service of summons was also made on all parties April 28, 1969

On May 2, 1969, hearing was had on the motion for preliminary injunction, at which all Petitioners were present in person and by counsel and at which time evidence was introduced pertaining to the existence of the strike, following which the preliminary injunction was ordered to issue on May 6, 1969.

The hearing on the rule to show cause was continued until May 5, 1969, at which time Respondent filed a motion to dismiss the proceedings in court and the rule to show cause, and the court having overruled the motion, took testimony offered by the Respondent and testimony offered by the Petitioners over a period of two days, during which all parties remained in open court. The court having ordered the preliminary injunction issued on May 6, 1969, followed this action with finding the defendant Union guilty of contempt on May 6, 1969, stating, in part, as follows:

"The Defendant Kankakee Federation of Teachers, Local No. 886, has, in the opinion of the Court, and the Court so finds, stood in hostile and open defiance of the lawful order of this Court.

It did not ask its attorney to come in with a motion to dissolve this injunction. It did not appeal from it. These are the—certainly the proper methods to challenge an order of the Court. If anyone thought it was wrong—and orders of the Court sometimes are erroneous—there is no question about that—there are proper, well known methods of correcting any such errors, but standing in open defiance before the public and before the Court of a legitimate lawful order of the Court can be nothing but a contempt of the Court."

THIS CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

In order for Petitioners logically to rest their contention that a substantial Federal question is here involved on *Carroll* v. *President and Commissioners of Princess Anne,* 393 U. S. 175, 21 L. Ed. 2d 325, 89 S. Ct. 347, they must equate the form of expression protected by the First Amendment to the Constitution of the United States in *Carroll* with the form of expression commonly referred to as a strike.

Both are expressions, both are forms of communication, but there are differences which Petitioners seek to have this court, as they have all courts below, ignore. Freedom of speech as a concept, as did all of the concepts behind the First Amendment, rested on a recognition of a perhaps subtle, but certainly difficult, characteristic of human nature. Although we can conceive and lay out an organized society, and enjoy its benefits for a time, we soon become restive under what we consider a yoke if that society makes demands which cannot be related easily and clearly to our personal wants and well being.

Thus, the political concept which bottoms freedom of speech was the deeply felt necessity for guaranteeing the integrity and effectiveness of opposition and criticism, legitimately expressed, within the framework of the remainder of the Constitution. The contemplated subjects of opposition were policies, measures and figures, public in nature. Thus, the protection of the First Amendment does not extend to the encouragement of the commission of a crime. *Fox* v. *Washington,* 236 U. S. 273, 59 L. Ed. 573, 35 S. Ct. 383.

The thing which distinguishes a strike from the sort of expression protected by the First Amendment, is its coer-

cive nature on the one hand, and its objectives on the other.

The strike involved in this case did have one thing in common with the kind of expression contemplated by the First Amendment in that its objective was to change the policy of a public body, but it was coercive rather than persuasive.

Here there was no attempt to enlist the support of brother members of the public but rather a defiance, at the very inception, or threshold, of the affair, of the public interest as expressed in Article VIII of the Constitution of the State of Illinois and of the public policy of that State as alluded to in the opinion in this case in the Supreme Court of Illinois when it pointed out that under *Board of Education of Community Unit School District No. 2* v. *Redding* (1965), 32 Ill. 2d 567, a strike of public employees was against the public policy of the State.

This strike, as is the case with almost all others, arose from, and fed upon, the particular personal goals of the strikers and not upon any professed or actual publicly related interest. It is respectfully suggested that considerations of a nature similar to the foregoing led to the expression in *Cox* v. *Louisiana,* 379 U. S. 536, 555, 13 L. Ed. 2d 471, 484, 85 S. Ct. 453, as follows:

> "We emphatically reject the notion . . . that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech."

Conceding the general importance of notice, but not its effectiveness in this case, other than to permit another day or two or delay in reopening the district schools, the issue of its absence as a denial of due process is considerably muddied by the fact that a general appearance

on the temporary restraining order was entered, all defendants were generally present at all hearings, notice was given of the motion for preliminary injunction, hearing was set, extensive evidence was produced, and the court allowed the motion for preliminary injunction before the contempt order was entered.

The Petitioners do not explain why this waiver, consciously made, should be treated any differently than a waiver of trial by jury by a person criminally charged. *Patton* v. *United States,* 281 U. S. 276, 299, 74 L. Ed. 854, 863.

Furthermore, if there was prior restraint involved in this case, it was not created by the temporary restraining order itself, but by Article VIII of the Illinois Constitution and *Redding,* neither of which were at any time during the proceedings up to the date of the filing of the Petition herein, questioned or attacked by motion to dissolve the injunction, or otherwise. The presence of Article VIII and *Redding* formed the basis for the issuance of the restraining order in the first place, and the decisions of the courts below.

In addition, the Petitioners have preempted any First or Fourth Amendment issue by refusing to obey the restraining order. Before the Court can consider the element of notice, it must first dispose of the question posed by the fact that the contempt involved was for the disobedience of an order of court and not for conduct taking place before that order was issued.

It is at this point that the thrust of the First and Fourteenth Amendments collide with the thrust of the Preamble to the Constitution.

However meticulously the individual rights guaranteed by these amendments are protected, they will be of little practical substance if the power of the People of the United States to "establish justice" is so eroded in the process of

protecting individual rights that justice, once conceived, cannot be enforced.

As awesomely, and at times dubiously, regarded, as is the power of contempt by various elements of our society, Blackstone, in 4 Blackstone Comm. 286, observed:

> "The process of attachment for these and the like contempts must necessarily be as ancient as the laws themselves; for laws without a competent authority to secure their administration from disobedience and contempt would be vain and nugatory. A power, therefore, in the supreme courts of justice, to suppress such contempts by an immediate attachment of the offender results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal."

The majority of the court in *Walker* v. *Birmingham,* 386 U. S. 307, 18 L. Ed. 2d 1210, 87 S. Ct. 1824, decided only four years ago, and in *Howat* v. *Kansas,* 258 U. S. 181, 66 L. Ed. 550, 42 S. Ct. 257, decided fifty years earlier, and relied upon in its decision by the Supreme Court of Illinois, tacitly, but firmly, upheld the logic of Blackstone's observation that laws without "authority to secure their administration from disobedience and contempt would be vain and nugatory".

The Court, in *Walker,* had before it the kind of circumstance envisioned by Blackstone, as does the Court in this case. In *Carroll,* relied upon by Petitioners, there was no element of disobedience of a court order. Thus, a majority of the Court in *Carroll* clearly distinguished the question there before it from the question presented in *Walker.* In *Carroll,* 393 U. S. 175, 179, 21 L. Ed. 325, 330, this Court made the following distinction between the two cases:

> "This conclusion—that the question is not moot and ought to be adjudicated by this Court—is particularly appropriate in view of this Court's decision in Walker v. Birmingham, 388 U. S. 307, 18 L. Ed. 1210, 87 S. Ct.

1824 (1967). In that case, the Court held that demonstrators who had proceeded with their protest march in face of the prohibition of an injunctive order against such a march, could not defend contempt charges by asserting the unconstitutionality of the injunction. The proper procedure, it was held, was to seek judicial review of the injunction and not to disobey it, no matter how well-founded their doubts might be as to its validity."

CONCLUSION.

There is no substantial question in this case which has not recently been decided.

In a society existing precariously in an age of increasing complexity, compounded by a growing impatience with the disciplines its complexities necessarily impose, the risk of error should fall upon the parties probing for weaknesses in published social disciplines rather than upon those charged with the maintenance of the integrity of an integral part of our strained social processes. It is submitted that this was the decision by this Court in *Walker,* and by the Supreme Court of Illinois in the case at bar.

We ask that the petition for the issuance of a writ of certiorari to review the decision of the Supreme Court of Illinois in this case be denied.

Respectfully submitted,

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